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# Religious Purpose, Inerrancy, and the Establishment Clause

DANIEL O. CONKLE\*

The Supreme Court's establishment clause doctrine has been attacked from all quarters. But on one point there is common ground: whatever else the establishment clause might mean, the Court and its critics agree that government cannot "prefer one religion over another."<sup>1</sup> This principle of religious equality stands as an uncontested first principle, a principle so obviously sound as to be virtually beyond question.

In this essay, I question the principle of religious equality. I do not challenge the principle in all, or even most, of its applications. But I do question the principle as it relates to another, equally basic component of the Court's doctrine—the prohibition on religiously motivated lawmaking. More specifically, I distinguish between "inerrant" religion, which is characterized by a certain type of closed-mindedness, and "dialogic" religion, which is not.<sup>2</sup> I contend that inerrant religion presents special dangers to the lawmaking process, dangers suggesting that lawmaking animated by an inerrant "religious purpose" should be invalid for that reason alone. By contrast, the presence of a dialogic "religious purpose" should not necessarily lead to invalidation. In this sense, government should be allowed to prefer one religion over another, dialogic religion over inerrant religion, and the establishment clause should be read to endorse this type of religious preference.

In Part I, I discuss the principle of religious equality. Part II presents the body of my argument. I suggest a theoretical explanation of the purpose component of establishment clause doctrine, and I advance my contention that inerrant and dialogic religious thought should be treated differently. This argument is controversial, and it is subject to powerful criticisms. Accordingly, in Part III, I discuss a number of objections that should be considered before my argument is embraced. In the end, then, I question not only the principle of religious equality, but also my own argument for rejecting it. I thus regard this essay as tentative and exploratory in nature; I mean to open a conversation, not conclude it.

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\* Professor of Law, Indiana University School of Law at Bloomington. I am indebted to Professors Richard Fraher, John H. Garvey, Kent Greenawalt, Stanley Ingber, Michael W. McConnell, Michael J. Perry, and Steven Douglas Smith for their extensive, thoughtful, and thought-provoking comments on an earlier version of this essay. I also profited from conversations with Professor Harry Pratter.

1. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

2. I define and explain this terminology in Part II.D.

## I

The familiar test of *Lemon v. Kurtzman*<sup>3</sup> serves as the primary vehicle for evaluating establishment clause challenges. To survive judicial scrutiny under *Lemon*, a statute (or other governmental action) must satisfy each of three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive governmental entanglement with religion.'"<sup>4</sup> This test embodies the controversial "no aid" principle that the Supreme Court first announced in *Everson v. Board of Education*.<sup>5</sup> Thus, the first two prongs of *Lemon* declare that government must remain neutral as between religion and irreligion and cannot aid or favor one over the other.<sup>6</sup>

Implicit in the *Lemon* test is a second principle, also derived from *Everson*—the principle of religious equality. As stated in *Everson*, government "cannot prefer one religion over another."<sup>7</sup> Based on this principle, the Court has ruled that governmental action preferring certain religions over others should be subjected to strict judicial scrutiny.<sup>8</sup> The Court's doctrine thus requires neutrality between religions just as it requires neutrality between religion and irreligion.<sup>9</sup>

Critics of *Everson* and *Lemon* contend that government should be permitted to favor religion over irreligion, and they therefore decry the "no aid" principle.<sup>10</sup> But they do not challenge the principle of religious equality. To the contrary, that principle stands at the center of their "no preference" alternative to the Court's existing doctrine. Under this alternative, as under the Court's prevailing approach, government is precluded "from asserting a preference for one religious denomination or sect over others."<sup>11</sup> Even if

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3. 403 U.S. 602 (1971).

4. *Id.* at 612-13 (citations omitted).

5. 330 U.S. 1, 15-16 (1947).

6. In testing for the neutrality required by the first two prongs of *Lemon*, the Court recently has emphasized the "endorsement or disapproval" inquiry that Justice O'Connor initially proposed in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring). See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

7. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

8. See *Larson v. Valente*, 456 U.S. 228, 244-55 (1982). The *Larson* Court itself did not regard its strict scrutiny approach as implicit in the *Lemon* test; rather, it viewed the strict scrutiny as a separate means of analysis. *Id.* at 251-52.

9. "The clearest command of the Establishment Clause," the Court wrote in *Larson*, "is that one religious denomination cannot be officially preferred over another." *Id.* at 244.

10. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting); R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

11. *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting). See generally Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245 (1991) (discussing possible variants of "no preference" notion).

*Everson* and *Lemon* were to be rejected, therefore, the principle of religious equality would almost surely remain intact. This principle is so well settled and so widely supported that most would regard it as axiomatic.<sup>12</sup>

## II

The first prong of the *Lemon v. Kurtzman*<sup>13</sup> test states a requirement that laws be grounded on secular as opposed to religious purposes. This requirement is plagued by significant definitional problems. What makes a purpose religious in the impermissible sense? And how should we deal with legislation that is the product of multiple motivations? I shall address these problems in reverse order.

### A

The problem of multiple motivations arises when individual legislators act for permissible as well as impermissible reasons, and also when some legislators act for permissible reasons, but others for impermissible. The Supreme Court has considered the problem of multiple motivations in its establishment clause cases, although the Court's pronouncements have hardly resolved the uncertainty in this area. In *Lemon* itself, the Court stated simply that a law "must have a secular legislative purpose."<sup>14</sup> In its initial *crèche* decision, the Court suggested that this requirement could be easily satisfied, ruling that the presence of "a" secular purpose is sufficient, even if that secular purpose is accompanied by a religious purpose as well.<sup>15</sup> Likewise, the Court has held that a law supported by a secular purpose is

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12. According to the principle of religious equality, any form of religious discrimination needs to be seen as incompatible with religious liberty and should be viewed as no less a violation of the human person than discrimination that is based on race, national origin, or sex. This is not to ignore the profound differences in teachings and practices that divide religions from one another, but these differences are no basis for any form of legal discrimination between the various religions.

Wood, *Religious Pluralism and Religious Freedom*, 31 J. CHURCH & STATE 7, 12 (1989). See generally Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193 (finding equality principle inherent in establishment clause); Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 741-55 (1986) (reading establishment clause to embody principle of "equal religious liberty"); Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986) (making similar argument).

13. 403 U.S. 602 (1971).

14. *Id.* at 612.

15. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." (citations omitted)); see also *Bowen v. Kendrick*, 487 U.S. 589, 602-04 (1988).

not invalid merely because it also "coincides" with religious doctrine.<sup>16</sup>

In other establishment clause decisions, however, the Court has addressed the problem of multiple motivations in language that implies a more searching judicial inquiry. In its moment-of-silence decision, for example, the Court stated that the secular purpose supporting a law must be "clearly secular."<sup>17</sup> And its "creation science" opinion suggested that the Court would invalidate a law whose "primary" purpose was religious, even if a secular purpose might also be present.<sup>18</sup>

These latter cases might be read to reflect an approach like the one the Court follows in the area of equal protection. In that area, the presence of multiple motivations does not immunize governmental action from motivational scrutiny. Instead, the governmental action is deemed to be grounded on a constitutionally impermissible purpose if that purpose was a but-for factor in the government's decision-making process.<sup>19</sup> Thus, for example, if a law would not have been enacted in the absence of a racially discriminatory motive, that law is regarded as racially discriminatory.<sup>20</sup> So, too, if this approach were applied to the establishment clause, a law would be deemed to rest on an impermissible religious purpose if the law would not have been enacted in the absence of that purpose.

In resolving the problem of multiple motivations, the equal protection approach provides a workable framework. Further, the approach is theoretically sound. When a law would not have been enacted but for a constitutionally impermissible purpose, that law should be declared invalid.<sup>21</sup> As a result, the equal protection approach can and should be extended to the establishment clause.<sup>22</sup> But all of this assumes an answer to the more fundamental definitional problem: what is an impermissible religious purpose in the context of this analysis?

16. *Harris v. McRae*, 448 U.S. 297, 319-20 (1980).

17. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

18. *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *cf. id.* at 599 (Powell, J., concurring) ("A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.").

19. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68, 270 n.21 (1977). The precise judicial inquiry, including the allocation of burdens of proof, varies by context. *See generally* Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (arguing that these context-based differences conceal a balancing of competing interests).

20. Such a racially discriminatory law or governmental action is not per se unconstitutional, but it is tested against a standard of extremely strict judicial scrutiny. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

21. *See* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116-18.

22. *See* Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 908-11 (1987).

## B

To discern the character of an "impermissible religious purpose," one first must discern the character of "religious." The definition of "religious" is a complex problem, but only at the margins. I need not confront that problem here, for I mean to address that which is indisputably religious. In particular, I mean to address a form of thinking that is religious in the traditional, typically theistic, sense—a form of thinking that is characterized, at least in part, by spiritual or otherworldly concerns, including concerns about the will of God.<sup>23</sup>

So understood, religious thinking necessarily includes a spiritual component. Yet it frequently concerns the here-and-now as well. This gives rise to two distinct sorts of religious purpose, either of which might form the predicate for legislation or other governmental action. A "spiritual" religious purpose addresses itself directly to the spiritual. A "worldly" religious purpose, by contrast, addresses worldly concerns on the basis of beliefs that are spiritual in nature.

As with the definition of "religious," the line between spiritual and worldly religious purposes can be difficult to draw.<sup>24</sup> But here again, the close definitional questions can wait for another day. At least in the context of governmental action, most religious purposes are easily classified as spiritual or worldly.

When a governmental action consists of prayer or other devotional activity or when it attempts to mandate, encourage, or support such activity by individuals, the government's purpose is spiritual in nature. Governmental sponsorship of devotional exercises in the public schools provides a classic example.<sup>25</sup> Other examples include official proclamations of spiritual beliefs,

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23. Professor Stanley Ingber has suggested that the term "religious" essentially should be restricted to this form of thinking and that "religion" should be defined accordingly for both establishment and free exercise purposes: "It is the role played by the sacred or the divine that separates religions from other belief systems (*i.e.*, ideologies) for legal purposes. Although not necessarily bound by any theistic precept, religious duties must be based in the 'other-worldly' or the transcendent . . ." Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 285-86 (1989) (footnotes omitted). I am sympathetic to this definition, but not to Ingber's further suggestion that such religious duties necessarily "are not matters of human debate, evaluation, or judgment." *Id.* at 333. See *infra* notes 54-56 and accompanying text. In any event, my limited focus permits me to avoid the type of comprehensive definition that Ingber advances.

24. Cf. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1003 (1989) ("Nearly all religious beliefs and practices have temporal consequences and implications that attract favor for earthly reasons.").

25. The Supreme Court declared such sponsorship unconstitutional in *Engel v. Vitale*, 370 U.S. 421 (1962) and *School Dist. v. Schempp*, 374 U.S. 203 (1963).

such as "In God We Trust"<sup>26</sup> or "one nation under God";<sup>27</sup> governmental sponsorship of devotional religious symbols;<sup>28</sup> publicly funded legislative prayer;<sup>29</sup> and other publicly funded religious worship or spiritual instruction.<sup>30</sup>

A worldly religious purpose also is grounded in spiritual beliefs, typically beliefs concerning the will of God, but its immediate concern is nonspiritual human behavior in the physical world. Thus, for example, to honor God's will by restricting abortion or by adopting regulations to protect the environment would be to further a worldly religious purpose.<sup>31</sup>

### C

Given these understandings of "religious purpose," what should be regarded as an "impermissible religious purpose"? This depends on the constitutional principles that this concept should be read to reflect.

One could argue that all religious purposes should be regarded as impermissible—that religious thought should be categorically excluded from the lawmaking process.<sup>32</sup> It seems plain, however, that religious thought cannot, and should not, be categorically excluded from the lawmaking process. Beginning with the Founding itself, the history of the United States reveals

26. 36 U.S.C. § 186 (1988) (national motto).

27. 36 U.S.C. § 172 (1988) (pledge of allegiance).

28. See generally *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (applying context-specific approach in determining whether establishment clause prohibits governmental displays of religious symbols).

29. See generally *Marsh v. Chambers*, 463 U.S. 783 (1983) (rejecting establishment clause attack on publicly funded legislative prayer).

30. This would include the provision of public funds to religious institutions, such as churches or religious schools, at least if any of the funds would be used to support spiritual activities.

31. See generally *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (rejecting establishment clause attack on abortion funding restrictions of federal Hyde Amendment).

Most laws that further worldly purposes, including my examples of abortion and environmental regulation, concern nonspiritual human behavior that might be seen to cause tangible harms, but this is not critical to my distinction. To the contrary, a religious purpose is properly characterized as worldly as long as it regulates nonspiritual human behavior, even if only because that behavior is regarded as sinful. See generally *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989) (rejecting establishment clause challenge to ban on school dances, a ban allegedly grounded on belief that dancing is sinful), *reh'g en banc denied*, 889 F.2d 192 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1811 (1990).

32. Cf. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10 (1980) ("[N]obody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied the rest of us."); Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 284 (1989) ("[O]ne should not advocate or promote any legal or public policy restrictions on human conduct unless one not only has and is willing to offer, but is also motivated by, adequate secular reason, where this reason (or set of reasons) is motivationally sufficient for the conduct in question." (emphasis in original)).

an inseparable connection between religion, morality, and law.<sup>33</sup> Many of our laws, even our basic system of constitutional government and individual rights, rest to a significant degree on religious understandings of the world, of human beings, and of social relationships.<sup>34</sup>

The connection between religion and law, moreover, is a contemporary as well as a historical phenomenon. In addressing social problems, lawmakers inevitably make value judgments. These judgments require a resolution of competing claims concerning what is good and what is evil. In a society as religious as ours, it is hardly surprising that citizens and their representatives frequently rely on religious beliefs in resolving these questions.<sup>35</sup>

Our society's traditional and contemporary practices necessarily inform our constitutional character. As a result, the traditional and contemporary prevalence of religiously motivated lawmaking strongly suggests that such lawmaking is not categorically unconstitutional. If so, then not all religious purposes are constitutionally impermissible.

Further, a general prohibition on religiously motivated lawmaking would undermine the presumption of openness in the lawmaking process—the presumption that lawmakers should be open to competing claims of knowledge and should be permitted to base their decisions on whatever claims of knowledge they find persuasive. This presumption rests on the value of an open competition of ideas in the political arena. In making political decisions, citizens and their representatives act on the basis of various sorts of

33. As two scholars recently have noted:

The Founders as a whole were deeply religious men. Religion played a vital role in most of their lives; it influenced their beliefs and activities, their ideals and hopes. The foundation of their modern republican philosophy was based on a belief in God. Whatever the concepts that blended to form this republican doctrine—the dignity of man, natural law, natural rights, the right of resistance—all were suffused with an aura of the sacred.

Vetterli & Bryner, *Religion, Public Virtue, and the Founding of the American Republic*, in *TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION* 91, 100 (N. York ed. 1988).

34. See H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974); Leedes, *Taking the Bible Seriously* (Book Review), 1987 AM. B. FOUND. RES. J. 311, 320-27.

35. As Professor Mark Tushnet has written, "People at all points on the political spectrum do in fact rely on their religious convictions in deciding to support or oppose expansion of public responsibility for the needy, increases in public responsibility for inculcation of moral values in the young, and a range of policies on abortion." Tushnet, *Religion in Politics* (Book Review), 89 COLUM. L. REV. 1131, 1131 (1989); see also P. BENSON & D. WILLIAMS, *RELIGION ON CAPITOL HILL: MYTHS AND REALITIES* (1986) (most Senators and Representatives are religious and are influenced by their religious beliefs); cf. M. Perry, *Love and Power: The Role of Religion and Morality in American Politics*, ch. 5, at 33-34 (Nov. 1990) (manuscript on file with *Indiana Law Journal*) (discussing "the essentially political nature of religion").

This is not to deny the powerful modern tendencies to privatize religion and to secularize public discourse. See Gedicks, *Some Political Implications of Religious Belief*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 421-27 (1990). As a result of these tendencies, religion plays a less prominent, and more controversial, political role than it did in the past, with religious influences often being disavowed by political participants and criticized by outside observers.



knowledge or beliefs—shared or contested, empirical or intuitive, intellectual or emotional, philosophical or experiential, demonstrable or speculative. The lawmaking process generally does not privilege certain types of beliefs over others. Rather, it is open to all claims of knowledge, and therefore to all citizens, whatever the basis of their beliefs. We expect the lawmaking process to separate right from wrong and good from bad. But at least presumptively, all claims of knowledge are permitted to compete on an equal footing, whatever their source or general character.

### D

I say “presumptively.” The presumption of openness is just that, a presumption. It can be overcome by constitutional principles that limit the ordinary operation of the lawmaking process. The equal protection clause, for example, forbids lawmakers from acting on the basis of racist beliefs. So, too, the establishment clause may restrict the use of religious beliefs by forbidding lawmakers from acting in furtherance of certain religious purposes, religious purposes that are deemed to be constitutionally impermissible.

Given the presumption of openness, as well as the traditional and contemporary influence of religion on the lawmaking process, the concept of impermissible religious purpose cannot categorically preclude religiously motivated lawmaking. But there may be room for a more limited concept of impermissible religious purpose, a concept informed by constitutional principles that are powerful enough to overcome the presumption of openness. If so, these principles might provide a constitutional basis for restricting the role of religion in the lawmaking process. I contend there are two such principles, each of which has a distinct and independent grounding.

*Principle Number 1: Absent good reason, government should not act purposefully in a manner that disapproves the religious or irreligious beliefs of individual citizens, whether directly or through an endorsement of competing religious or irreligious beliefs.* A person’s religious or irreligious beliefs stand at the core of his or her self-identity; they are who the person is. For the government to attack these beliefs with a statement of disapproval, therefore, is tantamount to a psychological assault. Moreover, in a religiously pluralistic society such as ours, when the government endorses the religion or irreligion of some, it necessarily disapproves the religion or irreligion of others. Thus, the government can disapprove the religious or irreligious beliefs of individual citizens either directly or through the endorsement of competing beliefs. In either case, this type of disapproval is likely to alienate the adversely affected individuals, thereby causing damage to the political community as well as to the individuals themselves. These factors support the principle I have suggested, which embodies a general prohibition on purposeful governmental action that sends religious or irre-

ligious messages of endorsement or disapproval.<sup>36</sup> Such action ordinarily should be deemed to reflect an impermissible religious purpose.

My first principle, however, is subject to a "good reason" exception: if the government has good reason, it may act in a manner that disapproves the religious or irreligious beliefs of individual citizens (typically by endorsing the religious or irreligious beliefs of other citizens). A spiritual purpose generally will not constitute good reason, but a worldly purpose generally will.

The potential harm from religious or irreligious messages is great, both to individuals and to the political community itself.<sup>37</sup> As a result, for the government to come within the exception to my first principle, it must be addressing a matter for which the exercise of governmental power is especially well-suited, if not essential. At least ordinarily, the exercise of governmental power is not well-suited, much less essential, for the accomplishment of spiritual ends. Religious individuals and groups simply have little need for the government's assistance in fulfilling their spiritual missions. In any event, governmental officials have no special competence in pursuing spiritual ends, and their action is as likely to retard as to advance the spiritual cause that they are attempting to further. Indeed, the government's use of coercive power actually might eliminate the spiritual value of what would otherwise be purely voluntary acts of devotion.<sup>38</sup>

But the use of governmental power often is essential, or at least well-suited, for the accomplishment of worldly ends, including worldly ends on which religious thinking has much to say. The concerns of religion include the concerns of this world—how we as humans treat each other and the planet on which we live. In the history of the United States, religion has played a prominent role in addressing social problems, including, for example, the problems of slavery and racial inequality. More recently, religious thinking has been brought to bear on the issues of poverty, abortion, and the environment. And the use of governmental power is extremely important, if not essential, to the resolution of these sorts of problems.

A law that embodies a religious but worldly purpose, reflecting the religious beliefs of some, inevitably offends the religious or irreligious beliefs

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36. For a much more elaborate defense of this general prohibition, see Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1113, 1172-82 (1988).

37. See *id.* at 1164-69.

38. See *id.* at 1180-82.

I say a spiritual purpose "generally" will not provide sufficient reason for the government to come within the exception to my first principle, because the exercise of governmental power is "at least ordinarily" ill-suited to such a purpose. Governmental actions that "accommodate" the free exercise of religion by removing burdens of the government's own creation might reflect a spiritual purpose that the government should be permitted to further. See generally McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1. Likewise, a spiritual purpose might be sufficient when the governmental action is not directly coercive and is supported by long-standing tradition. See Conkle, *supra* note 36, at 1183-87.

of others. This type of law endorses the approved religious beliefs, but it disapproves competing religious or irreligious beliefs. A law requiring racial integration on the basis of a religious but worldly purpose, for example, disapproves the religious beliefs of those who hold that God's will does not permit such integration, much less require it. Likewise, a religiously inspired restriction on abortion sends a message that endorses certain religious beliefs, but that disapproves competing beliefs. All such laws violate the general requirement of my first principle. But because the use of governmental power is well-suited to the achievement of the worldly ends that these laws address, the laws fall within the exception to this principle; there is good reason for creating the religious or irreligious offense.<sup>39</sup> As a result, these sorts of laws should not be found to rest on an impermissible religious purpose unless they run afoul of my second, independent principle.<sup>40</sup>

*Principle Number 2: Government should not act purposefully on the basis of an inerrant religious belief.* Even if a religious purpose falls within the exception to my first principle, it also must be tested against the second. In particular, a religious purpose, even if worldly, should be deemed an impermissible religious purpose if the pertinent religious belief is inerrant in character. A religious belief is "inerrant" if the belief is held to be entirely beyond question, reconsideration, or debate.<sup>41</sup> By contrast, a "dialogic" religious belief is subject to question, reconsideration, and debate.

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39. Professor Kent Greenawalt has suggested a further condition: that even in pursuing worldly ends, lawmakers should rely on a religious purpose only if nonreligious, "publicly accessible" reasons—"reasons whose relevance is generally acknowledged"—are inadequate to resolve the issue in question. K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 24 (1988); see also *id.* at 56-76. If Greenawalt is right, this would reduce the scope for my good-reason exception, but only to a modest extent. Under Greenawalt's approach, there would be no good reason to rely on a religious purpose if arguments based on "publicly accessible" reasons could resolve the issue. As Greenawalt explains, however, "publicly accessible" reasons are inadequate to resolve many of our most important and most contentious questions of public policy. Therefore, his condition leaves much room for religiously motivated lawmaking. See *id.* at 98-202. Even so, I am not convinced that we should accept Greenawalt's condition. In particular, I am not convinced that religious arguments should necessarily be relegated to the residual role, and therefore the second-class status, that Greenawalt's position clearly implies. For a persuasive critique of Greenawalt's "accessibility" requirement, see Smith, *supra* note 24, at 1007-15. For Greenawalt's most recent explication of his views, see Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990). Cf. M. Tushnet, *The Limits of the Involvement of Religion in the Body Politic* (1991) (manuscript on file with *Indiana Law Journal*) (arguing that it is permissible for lawmakers to rely on religious reasons, but only if the laws they adopt are independently justifiable on secular grounds).

40. In discussing my first principle and its exception, I have suggested that the establishment clause should be read to restrict the pursuit of spiritual religious purposes to a greater extent than worldly religious purposes. This proposition may find some, albeit limited, support in the Founding period. See Smith, *supra* note 24, at 969-71.

41. I thus use the phrase "inerrant religious belief" as a type of shorthand. Needless to say, the content of the belief may or may not be free from error, but it is *understood by the believer* to be inerrant.

Under this approach, the particular substantive content of religious beliefs is beside the point. Inerrant religious beliefs, like all religious beliefs,<sup>42</sup> are grounded in spiritual concerns. In the context of traditional, theistic religion, these beliefs address the nature of God and the nature and content of our human obligations to God. As my earlier discussion suggests, such obligations may be spiritual or worldly. An inerrant religious belief therefore might address a purely spiritual matter, such as the need for prayer, or it might address the will of God on a matter of worldly concern. And in the latter case, the resulting political position might fall anywhere on the conventional continuum between "liberal" and "conservative." Likewise, the source of the inerrant religious belief might vary; it might arise from personal prayer or contemplation, from a religious text, or from the statements of religious leaders, such as the Roman Catholic pope or an Islamic ayatollah.

In the United States today, the most prominent form of inerrant religious thought is based upon a doctrine of Biblical inerrancy. In its most common formulation, this doctrine holds that the Bible is literally true and that its literal truths are not subject to question, reconsideration, or debate.<sup>43</sup> Thus, for example, the Bible's explanation of creation, taken literally, cannot be subjected to scientific examination,<sup>44</sup> nor can its descriptions of the role of women be tested against the thinking and experiences of the modern world. This understanding of the Bible is embraced by a surprisingly large portion of the American population.<sup>45</sup> But this prominent religious movement merely represents an example of the religious inerrancy to which I refer. Its particular characteristics and political positions are not important to my argument. To the contrary, my argument applies to all types of inerrant religious thinking, regardless of the source and whatever the political positions such thinking might support.<sup>46</sup>

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42. At least as I have defined "religious" beliefs for the purpose of this essay. See *supra* note 23 and accompanying text.

43. According to survey data, as many as 40% of the American people believe that the Bible is the "actual word of God and is to be taken literally, word for word." N. AMMERMAN, *BIBLE BELIEVERS: FUNDAMENTALISTS IN THE MODERN WORLD* 6 (1987); see also Gallup, *Religion in America*, 480 ANNALS 167, 168 (1985) (37% of American public believes Bible should be taken literally). A less restrictive formulation of Biblical inerrancy would agree that the Bible is without error, but not necessarily on a literal reading.

44. According to survey data, as many as 44% of the American people believe that "God created man pretty much in his present form at one time during the last 10,000 years." N. AMMERMAN, *supra* note 43, at 6; see also Gallup, *supra* note 43, at 168.

45. See *supra* notes 43 & 44.

46. As the example of Biblical inerrancy suggests, religious inerrancy may attach to a source of beliefs, rather than directly to a belief as such. And if that source is subject to differing interpretations, there may be some room for debate—within the confines of the source—concerning the beliefs that the source inerrantly commands. Thus, for example, Biblical inerrantists might regard the Bible as their inerrant source of beliefs, yet still disagree about what the Bible actually means. Even if there is some room for this type of internal debate,

Dialogic religious beliefs, no less than inerrant beliefs, can form the basis for governmental action that violates my first principle, which generally prohibits the pursuit of spiritual ends through laws that embody religious messages. That first principle guards against governmental action that inflicts needless injury to religious and irreligious individuals and to the political community itself. These injuries do not depend on whether the religious beliefs that animate the laws are inerrantly held, and the principle therefore applies even when the religious beliefs are dialogic in nature.

My second principle reflects an independent concern. When government acts on the basis of inerrant religious beliefs, it violates a core tenet of our democratic system—that legal policies should be formulated on the basis of a dialogic decision-making process, a process requiring an openness of mind that religious inerrancy does not allow.<sup>47</sup> Governmental action based on inerrant religious beliefs therefore should not be permitted.

Our contemporary system of government and laws has intellectual roots in reason as well as religion. The Founders were overwhelmingly religious, but they also were deeply influenced by the Enlightenment. The Enlightenment taught that divine revelation could not establish truths that were contrary to reason. To many Enlightenment thinkers, however, revelation remained an important supplement to reason, and religion and reason therefore played complementary roles in the search for truth.<sup>48</sup> Under this view, religion was not antagonistic to the Enlightenment unless the religion was itself beyond the testing of reason. This was the dominant view of the Founders.<sup>49</sup>

More generally, as scholars recently have emphasized, the Founders were influenced by republican as well as liberal political theory. Just as the Enlightenment emphasized the importance of reason, republican theory called for the use of reasoned inquiry and debate in the formulation of governmental policies. Unlike the liberal model of competing interest groups, the republican model urged a deliberative politics that would search for the public good.<sup>50</sup>

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however, beliefs derived from an inerrant source remain entirely immune from external challenges to their validity. As a result, they raise the problems of closed-mindedness that I discuss in the text, and they properly are regarded as inerrant religious beliefs.

47. Earlier I discussed the presumption of openness in the lawmaking process. See *supra* Part II.C. (last paragraph). The notion of openness of mind is a separate but related idea.

48. See H. MAY, *THE ENLIGHTENMENT IN AMERICA* xiv (1976).

49. James Madison, for example, represented "the center of the American religious spectrum." *Id.* at 96. "He arrived at a consistent, lifelong defense of Christianity on the basis both of reason and intuition, shifting gradually like many contemporaries from the first to the second." *Id.*

50. See Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-51 (1988); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-48 (1985). Republican theory, of course, is far more complex and diverse than my capsule summary might suggest. See generally Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

These themes of the Enlightenment and republicanism continue to influence our scheme of constitutional democracy. One obviously cannot deny the powerful roles of liberal theory and interest group politics. Nonetheless, even in the context of interest group politics, we expect legislators and other officials to respond to argument as well as to political pressure. We expect them to give reasons for their decisions,<sup>51</sup> and the potential for reasoned debate and criticism is always present. That potential serves as an important check on political bargains that are ill-advised and contrary to the public good. Indeed, our modern Constitution exudes a general principle forbidding unreasoned governmental policies, policies that amount to "naked preferences."<sup>52</sup> In short, our democratic system requires a deliberative, dialogic decision-making process, a process that at least permits the possibility that argument will lead to a change of mind.<sup>53</sup>

Dialogic religious thinking is not inconsistent with this political tradition. Dialogic religious beliefs, because they are religious beliefs, are grounded in spiritual concerns. But they are not beyond challenge. Like nonreligious beliefs, dialogic religious beliefs may be strongly held, but they are always subject to re-examination in the light of new understandings, new evidence, or new arguments. As a result, these religious beliefs are subject to a type of testing that is similar to the testing of nonreligious beliefs.<sup>54</sup>

A dialogic religious belief, for example, may be put into question on the basis of scientific evidence. If science persuasively disproves the belief, it will be abandoned, and the religious believer will accordingly modify his or her understanding of the world. Faced with scientific proof of evolution, for example, many Christians and Jews have accepted a revised understanding of the origins of life on earth. This type of new understanding requires a rethinking of religious beliefs, but that need not trouble the religious believer. Just as a person seeks knowledge in general, a search for religious

51. Even if those reasons might be drawn from the arguments of interest group lobbyists.

52. See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

53. It may seem ironic to prefer uncertainty to certitude in the lawmaking process. But the preference is only for a minimal sort of uncertainty, that is, a minimal willingness to consider contrary argument.

54. As Professor Roger C. Cramton has written:

Every belief must be tested by one's experience, evaluated for consistency with other beliefs that one has found useful and reliable, and compared with contrasting views. All great religions . . . require that we use our minds to discover what is required of us. Being fully human is being rational as well as intuitive and insightful. Openness to new experiences and insights, constant reformulation of beliefs based on new knowledge, a tolerance for other views that are supported by data or rational argument—these are the basic elements of the method by which we can arrive at closer approximations of the truth.

Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 515 (1987). This type of religious thinking belies "the often unstated premise of many liberal theorists that reasoning and religious beliefs are mutually exclusive means for understanding the world." Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 986.

knowledge may be predicated on an open-minded search for truth, a search that contemplates a lifelong journey of religious growth and enhanced understanding.<sup>55</sup>

Dialogic religious beliefs that are normative in character are likewise subject to challenge and testing. If certain passages of the Bible seem at odds with a proper understanding of the role of women in our society, for example, religious believers might conclude that those passages should not be controlling. Their normative understanding of the world might thus be changed on the basis of experience and argument, and this might affect their sense of religious knowledge.<sup>56</sup>

Inerrant religious beliefs stand in stark contrast. They are the product of a psychological process qualitatively different from other types of thinking. To hold a belief as inerrant is to place that belief beyond the reach of empirical evidence and conflicting normative argument.<sup>57</sup> This type of think-

55. Consider the view of theologian Karl Rahner:

[I]n . . . cases of conflict between theology and natural science, theology is . . . frequently compelled to reexamine itself, to understand itself better, to give way to natural science. . . . In practice, therefore, there is an open relationship between natural science and theology . . . .

. . . [T]his pluralism of the sciences, including also theology, is not a static reality remaining always the same, but takes the form of a task demanding a truly historical even though asymptotic trend toward an integration and a unity.

. . . .

. . . Faith and theology do not really give the natural sciences their right to exist, but find them already existing and thus see that their validity must be recognized even in the light of the very nature of the understanding of man produced by faith; they see that they must live together with these sciences in an open dialogue the concrete outcome of which cannot exactly be foreseen by either side.

K. RAHNER, *On the Relationship between Natural Science and Theology*, in 19 THEOLOGICAL INVESTIGATIONS 16, 20, 23 (1983).

56. Consider the comments of Professor Michael J. Perry, a Roman Catholic who describes himself as a partisan of "Jerusalem-based" morality:

If one can participate in politics and law . . . only as a partisan of particular moral/religious convictions about the human, and if politics is and must be in part about the credibility of such convictions, then we who want to participate, whether as theorists or activists or both, must examine our own convictions self-critically. We must be willing to let our convictions be tested in ecumenical dialogue with others who do not share them. We must let ourselves be tested, in ecumenical dialogue, by convictions we do not share. We must, in short, resist the temptations of infallibilism.

M. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* 183 (1988). For Perry's extended defense of dialogic, ecumenical religion and "ecumenical politics," see M. Perry, *supra* note 35.

57. According to Jerry Falwell, for example, "[t]he Bible is absolutely infallible, without error in all matters pertaining to faith and practice, as well as in areas such as geography, science, history, etc. The disintegration of our social order can be easily explained. Men and women are disobeying the clear instructions God gave in His Word." J. FALWELL, *LISTEN AMERICA* 63 (1980).

Many Protestant Fundamentalists believe "that every word of scripture (often as found in

ing obviously is within the rights of religious citizens, and it may properly guide their private behavior, whether as individuals or groups. But it should not form the basis for lawmaking in an open democracy. Any law that is animated by an inerrant religious purpose, therefore, should be invalid for that reason alone. This supports the second principle that I have suggested.<sup>58</sup>

Bear in mind what my second principle does not say. It does not say that those who hold inerrant religious beliefs can play no role in the lawmaking process nor that those who hold dialogic beliefs can play an unlimited role. My second principle focuses not on the general belief structure of religious believers; instead, it focuses on the particular belief on which a law is predicated. Even for the most open-minded of religious believers, certain core beliefs may be inerrantly held. Few religious believers, for example, would be open to argument on the question of whether God exists. Conversely, religious believers who hold many inerrant beliefs are likely to hold dialogic beliefs as well. The critical question is whether governmental action is animated by a religious purpose that is grounded on an inerrant religious belief.<sup>59</sup>

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the King James Version) is to be taken at face value." N. AMMERMAN, *supra* note 43, at 5.

For them, it is God's Word, and it contains the answer to whatever questions they or anyone else might have. Because it is God's Word, it is complete and true. . . . [B]ecause God is the timeless author of every word and story, the Bible need not be interpreted in a historical or literary context. Each word is equally valid, and each sentence is equally timeless and useful.

... If Genesis says "day," it means twenty-four hours. If it says that man is created in the image of God, then human beings can have nothing in common with any lower animals. . . .

... "Of course, when you accept the Lord, you accept the Bible, and you accept God's Word. And if God says it, then there's really no argument."

*Id.* at 51-52 (emphasis in original) (quotation unattributed).

58. According to Professor Kent Greenawalt, lawmaking should not be predicated on religious beliefs that are demonstrably in conflict with "publicly accessible" forms of reasoning. See K. GREENAWALT, *supra* note 39, at 204-07. From my perspective, such a conflict would provide important, but not definitive, evidence that the religious beliefs are inerrant in character.

More tentatively, Greenawalt also suggests that whatever their religious viewpoints, citizens and lawmakers should remain open to "publicly accessible" forms of reasoning, although not as a judicially enforceable constitutional requirement. See *id.* at 207-11, 249-50. This suggestion moves Greenawalt in the general direction of my argument concerning inerrancy, albeit to a limited extent and on the basis of reasons that are rather different from mine.

59. In one sense, most religious purposes may be grounded on an inerrant religious belief. As I have suggested, most religious believers inerrantly believe that God exists, and this belief may very well form the first link in a chain of reasoning that ultimately leads to various other beliefs. But this type of remote inerrancy, standing alone, does not meaningfully close the door to a dialogic consideration of specific questions of public policy. The application of my second principle therefore should be limited to circumstances in which the inerrant beliefs are relatively specific and play a relatively immediate causative role in the formulation of public policy.



*E*

To recapitulate, governmental action should be deemed invalid if it violates either or both of my two principles. My first principle embodies a general prohibition on the pursuit of spiritual ends through laws that embody religious messages, because such laws are needlessly injurious to religious and irreligious individuals and to the political community itself. Dialogic as well as inerrant religious beliefs can form the predicate for violations of this principle. When a religious purpose is worldly instead of spiritual, the good reason exception to my first principle is likely to apply, which brings my second principle into play. Under this principle, even a worldly religious purpose is impermissible if it is based on an inerrant religious belief.

The operation of these principles can be illustrated by considering three areas of establishment clause concern: school prayer, evolution, and abortion. Governmental sponsorship of prayer in the public schools is invalid because it violates my first principle.<sup>60</sup> The sponsorship of prayer endorses the religion of some, and it thereby disapproves the religion or irreligion of others. Because the government's purpose is spiritual as opposed to worldly, moreover, the governmental action does not fall within my good reason exception. The individual and community damage that results from the governmental action is needless and constitutionally unacceptable. Governmental sponsorship of school prayer might also violate my second principle, which would provide an independent and alternative basis for invalidation. This would be true if the animating religious purpose were grounded on an inerrant religious belief, for example, an inerrant belief that school prayer is required by the will of God. But even if the animating religious belief were dialogic, my first principle would be sufficient to require invalidation.

Governmental action designed to encourage the teaching of creationism instead of evolution, by contrast, does not violate my first principle. Although it endorses religion in a manner that otherwise would violate the principle, it falls within the good reason exception. Such governmental action does offend the religious and irreligious individuals who hold competing beliefs. But it is important for the government, through the public schools, to teach children about the origins of the earth and the human species. Such teaching addresses a worldly concern—the acquisition of knowledge about the physical world—and it may provide an essential foundation for other types of worldly learning as well.

A governmental preference for the teaching of creationism, however, violates my second principle, because it rests on an inerrant religious belief.

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60. The Supreme Court declared such sponsorship unconstitutional in *Engel v. Vitale*, 370 U.S. 421 (1962), and *School Dist. v. Schempp*, 374 U.S. 203 (1963). See also *Wallace v. Jaffree*, 472 U.S. 38 (1985).

In an earlier age, this might not have been so. In that age, a literal reading of Genesis might have reflected the best available information on the origins of the earth and humankind. If so, then the religious purpose giving rise to such teaching might have been based on a dialogic religious belief. In the present state of scientific knowledge, however, a literal reading of Genesis cannot be defended by anyone willing to confront the evidence. Governmental action designed to encourage such an understanding of creation, therefore, must be based on an inerrant religious belief, a belief that is held to be inerrantly true and thus not subject to evidentiary refutation. This type of governmental action violates my second principle and therefore is unconstitutional.<sup>61</sup>

Whatever else it may involve, abortion is a religious issue. At the heart of this issue are two competing interests: that of the pregnant woman and that of her fetus. Critical to this conflict is an evaluation of the life of a human fetus. Many religious believers contend that prenatal human life is precious in the eyes of God, just as all human life is precious. As a result, they believe that such life should not be extinguished, at least not in the absence of compelling circumstances, such as a serious threat to the life or health of the woman. The regulation of abortion therefore is likely to be religiously motivated. As with the teaching of creationism, however, the religious purpose is worldly, not spiritual. Although grounded in spiritual beliefs concerning the will of God, its immediate concern is to protect prenatal life by regulating nonspiritual human behavior in the physical world. Unlike a spiritual purpose, moreover, the worldly purpose of protecting prenatal life is one for which the use of governmental power is useful, if not essential. As with the teaching of creationism, the religiously motivated regulation of abortion thus falls within the exception to my first principle. Although it endorses certain religious beliefs and thereby disap-

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61. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Supreme Court invalidated a statute that banned the teaching of evolution in the public schools. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court went one step further, invalidating a statute that, in essence, mandated that public schools teach "creation science" *alongside* evolution. At first glance, this type of statute might seem an unlikely target for invalidation under the analysis I have suggested. After all, the statute in *Edwards* did not preclude the teaching of evolution, and, at least in form, it would have permitted students a type of "dialogic" encounter with competing theories of truth—that of evolution and that of "creation science." But at least according to the Supreme Court, the statute in fact was designed to advance a religious understanding of creation, an understanding that appeared to be drawn from a literal reading of Genesis. See *id.* at 585-94; *id.* at 597-604 (Powell, J., concurring). If so, then the statute must have been grounded on an inerrant religious belief and was indeed unconstitutional under the analysis I have proposed. See generally Rosen, *Continuing the Conversation: Creationism, the Religion Clauses, and the Politics of Culture*, 1988 SUP. CT. REV. 61, 76 (suggesting that Supreme Court's jurisprudence under religion clauses is designed in part to preserve "conversation" and that creationist religious beliefs may "put a stop to conversation rather than facilitating it").

proves competing beliefs, there is good reason sufficient to justify this endorsement and disapproval.

Whether the regulation of abortion violates my second principle depends upon whether the religious belief that animates the regulation is inerrant in nature. A religious belief that abortion should be restricted in a particular way might or might not be inerrant. The American pro-life movement is supported by many religious believers who almost surely hold inerrant beliefs concerning this issue. But other religious opponents of abortion may base their opposition on dialogic beliefs; they may be willing to test their position against competing evidence and arguments. Whether a particular abortion regulation is invalid under my second principle, therefore, depends on the context in which it was adopted. The question is one of governmental motivation: was the regulation motivated by a religious purpose grounded on an inerrant belief? If so, and if that purpose was a but-for factor in the government's decision-making process, the regulation is invalid. If not, the regulation should not be invalidated on the ground of impermissible religious purpose.<sup>62</sup>

For a similar but less emotional example, one could substitute an environmental regulation. Many religious believers contend that all life, including nonhuman life, is precious in the eyes of God. On that basis, they may support the protection of endangered plant and animal species. If a regulation is adopted on the basis of this religious purpose, it will offend religious and irreligious individuals who hold contrary beliefs, for example, that human well-being should take precedence over nonhuman environmental concerns. The religious purpose is worldly, however, and the regulation falls within the exception to my first principle. If the religious purpose depends upon a religious belief that is inerrantly held, the environmental regulation should be invalidated under my second principle. But if the belief is dialogic, the law should be upheld despite its religious purpose.

### F

In upholding an abortion regulation against an establishment clause challenge, the Supreme Court stated that a law was not invalid merely because it "happens to coincide or harmonize with the tenets of some or all religions."<sup>63</sup> In order to uphold the law under the first prong of *Lemon*, however, the Court found itself obliged to find a secular, nonreligious motivation, so that the religious purpose could indeed be labeled "coinci-

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62. I am putting aside other potential challenges to such a regulation, including challenges based on substantive due process instead of the establishment clause. See generally *infra* notes 68-69 and accompanying text.

63. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

dental." The Court suggested that the law was "as much a reflection of 'traditionalist' values towards abortion, as it [was] an embodiment of the views of any particular religion."<sup>64</sup> Perhaps the law was supported by a "traditionalist" purpose that was not religious. But to require the showing of such a nonreligious purpose is wrong, for it suggests an unjustified hostility toward religious beliefs.

Religious beliefs are central to the lives of many Americans.<sup>65</sup> In the absence of a strong justification, these individuals should not be asked to put their religious beliefs aside when they enter the political arena, nor should they be encouraged to contrive supposed "secular" reasons for their political positions.<sup>66</sup> To say that a law cannot be based on religious beliefs unless it also is supported by "traditionalist" values is misguided. Anyone who cares to look can see that much of the American legal system rests on religious values.<sup>67</sup> And there is no reason to pretend that those values are somehow less legitimate than an ill-defined interest in "traditionalism."

More generally, there is no reason for an absolute prohibition on religiously motivated lawmaking, and the Court's doctrine is mistaken to the extent it suggests otherwise. A religiously motivated law, like any other law, may violate constitutional provisions other than the establishment clause. Thus, it may violate constitutional provisions that protect the liberties of those whose conduct the law would regulate.<sup>68</sup> For example, a restriction on abortion might violate the substantive due process rights of pregnant women.<sup>69</sup> But what is critical for establishment clause purposes, I submit,

64. *Id.* (citation omitted).

65. According to survey data, religion is "very important" to over 55% of the American population, and if we add in those for whom religion is "fairly important," the percentage exceeds 85%. See G. GALLUP, *THE GALLUP POLL: PUBLIC OPINION* 1989, at 204 (1990).

66. Cf. M. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY*, *supra* note 56, at 181-82 (arguing that religious convictions are self-constitutive and that "[t]o 'bracket' such convictions is . . . to bracket—to annihilate—essential aspects of one's very self").

67. See *supra* notes 32-35 and accompanying text.

68. See generally Garvey, *A Comment on Religious Convictions and Lawmaking*, 84 MICH. L. REV. 1288 (1986) (suggesting that liberal democracy values certain goods, including certain individual freedoms, and that religiously motivated lawmaking should not conflict with those goods).

69. Under conventional constitutional doctrine, this and other individual rights issues are resolved by balancing the governmental interests in regulation against the presumptively protected liberty of those whose conduct is being restricted. Different individual liberties are valued differently. This affects the strength of the presumptive constitutional protection they receive and therefore the burden the government must bear in justifying its regulations. Thus, the government must have especially weighty interests if it wishes to intrude on individual liberties that are highly valued, such as the constitutionally protected "right to privacy," a right that has conventionally been understood to protect abortion decision making.

My proposed reading of the establishment clause would not directly affect this analysis. On the other hand, my discussion would bear on the proper evaluation of governmental interests that are advanced to justify an intrusion on individual liberty. In particular, it would suggest that if a law can survive the establishment clause analysis I have proposed, the interests that the law advances should not be declared illegitimate or insubstantial merely because of their religious underpinnings.

is compliance with the two principles I have suggested. If a law can withstand that scrutiny, its religious grounding should not itself be problematic. In particular, a purpose that is religious but worldly ordinarily should not be problematic if the religious belief is dialogic in character.<sup>70</sup>

### III

I have advanced a normative argument concerning how we ought to understand the purpose component of establishment clause doctrine. The principles that I have suggested require us to distinguish religious purposes that are spiritual from those that are worldly. They also require us to distinguish religious beliefs that are inerrant from those that are dialogic.

According to the distinctions that I have drawn, inerrant religious beliefs are qualitatively different from dialogic beliefs. In deciding whether governmental action is grounded on an impermissible religious purpose, moreover, this difference generally should be determinative for cases in which the animating purpose is religious but worldly. To this extent, I have suggested a direct and explicit abandonment of the principle of religious equality: two types of concededly religious beliefs would be treated differently under the establishment clause, with dialogic beliefs being preferred over inerrant beliefs.

At least four objections might be advanced against my thesis. The first relies on the principle of religious equality. Whatever the proper role of religious beliefs in the lawmaking process, one might argue, all such beliefs should be treated alike. If dialogic religious beliefs can inform a worldly religious purpose, so too for inerrant beliefs. Conversely, if inerrant beliefs can play no such role, dialogic beliefs should be treated the same way.<sup>71</sup> And as I suggested earlier, this principle of religious equality has been strongly and consistently supported in our constitutional jurisprudence.

But no principle, even one that has come to attain an axiomatic status, should be immunized from critical argument.<sup>72</sup> I have shown that certain religious beliefs are qualitatively different from others, and this difference supports the distinction that I have suggested. I would emphasize, moreover,

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70. As this discussion suggests, I believe that religion is a source of truth that may properly form the basis for governmental action. By contrast, I am not contending that dialogue is itself a source of truth.

71. Some might contend that in precluding the use of inerrant religious beliefs as the basis for governmental action concerning worldly matters, I leave too little room for religiously motivated lawmaking. Others might contend, to the contrary, that my argument leaves too much room for such lawmaking by generally permitting the use of dialogic religious beliefs in this context. Although these two positions would reflect antagonistic perspectives concerning the propriety of religiously motivated lawmaking, both would find support in the principle of religious equality.

72. Unless, of course, the principle is inerrant.

that my proposed abandonment of the principle of religious equality is limited in two important respects. First, it is limited to the particular context that I have addressed, that of religiously motivated lawmaking. Second, it does not draw a distinction between religions as such; instead, it calls for attention to the particular religious beliefs that form the predicate for lawmaking.<sup>73</sup>

A second objection would be grounded on implementational difficulties. Thus, one might accept my basic theoretical framework but contend that the framework is not susceptible to judicial administration. More specifically, one might argue that the distinction between inerrant and dialogic religious beliefs is too imprecise to serve as a standard for judicial decision making. Clearly, the line between inerrant and dialogic beliefs is difficult to draw. At some point, a strongly held but dialogic belief becomes an inerrant belief; to that extent, the difference may be a matter of degree. Moreover, inerrant and dialogic belief structures and manners of argument may be interrelated in complex ways,<sup>74</sup> compounding the difficulty of judicial categorization.<sup>75</sup>

My suggested distinction obviously would benefit from further refinement. Even without refinement, however, the distinction would provide a basis for resolving clear cases. It also would provide a general standard, supported by a normative rationale, that could guide the resolution of closer cases. As such, the proposed distinction seems no more vague than existing establishment clause standards. The process of case-by-case adjudication, moreover, might well permit the development of more precise decisional signposts.

A third objection, likewise relating to implementational difficulties, would focus on the required motivational inquiry. Motivational inquiries are always

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73. An additional, related objection also would focus on the importance of equality, but from a different perspective. As a matter of demographics, inerrant religious beliefs may tend to be held more often by those in lower economic and social groupings. See N. AMMERMAN, *supra* note 43, at 6. Thus, my argument may effectively advocate a greater role for the religion of well-to-do and educated Americans and a lesser role for the religion of those who are poor or undereducated. There is no precise relationship here, but I nonetheless am bothered by this argument.

74. For example, one might think that God has inspired him or her to understand the right answer to a political or moral problem but not be sure that God in fact has spoken. Such a believer might not inerrantly believe in the inspired answer but still be unwilling to engage in ordinary dialogue concerning its content. Or one might believe in Biblical inerrancy and all the further beliefs that such inerrancy entails but at the same time be open to argument concerning whether the Bible in fact should be understood in this fashion. In this sense, one might dialogically believe in inerrancy.

75. These interrelationships may complicate not only the question of whether any given beliefs should be characterized as inerrant, but also the question of how the inerrancy, if any, may have influenced the government's decision-making process. See *supra* note 59 ("remote inerrancy" should not be regarded as problematic); *supra* notes 19-22 and accompanying text (discussing but-for causation requirement). These complications also create the risk of unduly intrusive judicial examinations of religious beliefs and doctrines.

difficult, especially when it appears that legislation is the product of multiple motivations. My suggested framework is multi-faceted, and a court would inevitably find itself in a state of uncertain knowledge. In the face of that uncertainty, how could a court be expected to make the various distinctions that my argument requires? For example, how could a court determine the but-for motivational role not merely of religion in general, but of inerrant as opposed to dialogic religious beliefs? This, too, is a weighty objection. Even so, motivational questions are questions of fact; like other fact questions, they can be decided by courts on the basis of probabilities. And I am not convinced that the motivational inquiry suggested here is substantially more difficult than motivational inquiries conducted in other areas.<sup>76</sup>

Although I have offered rebuttals to these last two objections, I cannot deny that it would be difficult for the judiciary to implement my suggested framework. Indeed, I am willing to assume that the judiciary might not be willing to embrace the framework, at least not in full. Even on that assumption, however, the proposal might have practical implications on three different levels. First, courts might be willing to apply my analysis when the inquiry would not be especially difficult. In some cases, the motivational predicate for a law is relatively obvious.<sup>77</sup> Second, my analysis might influence judicial decision making even within the basic contours of existing doctrine. The purpose component of the Supreme Court's existing establishment clause doctrine is imprecise and therefore capable of flexible application. Even without any basic change in doctrine, therefore, courts could include factors of the sort discussed in this essay as relevant considerations that might help inform their decision making. Third, my analysis might influence nonjudicial officials who are concerned about constitutional limitations on their decision-making power. To whatever extent my proposal might not be judicially enforceable, it still could guide the behavior of conscientious legislators who wished to honor establishment clause policies, even if the courts would not require them to do so.<sup>78</sup>

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76. In the establishment clause area, as elsewhere, the Supreme Court has shown more willingness in some cases than in others to examine legislative history in an attempt to uncover hidden legislative motives. *Compare, e.g.,* *Edwards v. Aguillard*, 482 U.S. 578, 585-94 (1987) (closely examining legislative history and disregarding stated legislative purpose as "sham") with *Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2371 (1990) (plurality opinion) (focusing on "avowed" legislative purpose and stating that "what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law" (emphasis in original)).

77. *See, e.g., Edwards*, 482 U.S. 578 (invalidating "creation science" statute as being grounded on religious understanding of creation); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating moment-of-silence law whose legislative history clearly suggested that legislature's purpose was to endorse prayer).

78. Legislators obviously could not question the content of any religious beliefs that they themselves held as inerrant. But at least in some circumstances, they might decline to adopt legislation that was predicated on such beliefs. *Cf. Greenawalt, supra* note 39, at 1025-26

Whether enforced by judges or through legislative self-restraint, however, my framework is subject to a fourth and more fundamental objection. Accepting my distinction between inerrant and dialogic religious beliefs, one might object that this distinction is not extended to *secular* beliefs. A psychology approaching inerrancy might well occur in the realm of secular thought.<sup>79</sup> If so, then to limit the lawmaking role of *religious* inerrancy would provide an incomplete response to the problem. Worse still, this incomplete response could be criticized for being hostile to religion; it would restrict the role of religious inerrancy, but not the role of its secular counterpart.<sup>80</sup>

I suspect that the problem of inerrancy is more likely to arise in the context of religious beliefs. In any event, the focus of the establishment clause is properly limited to this context. But I might be mistaken about the prevalence of secular inerrancy, and the establishment clause should not be interpreted in a manner that unjustifiably prefers the secular to the religious.<sup>81</sup>

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At the outset, I characterized this essay as tentative and exploratory in nature. My thesis is controversial, and I am troubled by the objections that I have discussed, especially the fourth one. I have offered responses to these objections, however, and I have presented affirmative arguments that support the framework that I have described.

Whether my suggested framework should be adopted remains to be seen. But whatever its immediate implications for the courts or other governmental officials, this essay makes an observation with both theoretical and real-world significance: religious inerrancy, a quite common form of thinking in the United States,<sup>82</sup> poses a special risk to the lawmaking process, a risk that dialogic religion does not. More generally, the essay suggests that the

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(discussing how political principles can have practical impact on use of religious convictions). See generally Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (arguing that legislators should consider constitutionality of proposed legislation and refrain from unconstitutional enactments).

79. Cf. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 942 (1989) (suggesting that nonreligious as well as religious beliefs may be held in closed-minded fashion).

80. I have no desire to tilt the public square in the secular direction. Much to the contrary, one of the goals of this essay is to provide reasons for opening the public square to explicitly religious, but dialogic, arguments about worldly matters. See *supra* Part II.F.

81. If this fourth objection has merit, it might suggest not that my thesis should be rejected, but rather that the thesis should be extended to the secular domain. Thus, one might argue that without regard to the establishment clause as such, the Constitution should be read to impose a general restriction on lawmaking grounded on inerrant beliefs, whether or not religious in nature. See generally *supra* notes 50-53 and accompanying text.

82. See *supra* notes 43-45 and accompanying text.



principle of religious equality should not be regarded as axiomatic. All religions are not alike, and their differences may have important implications for the resolution of church-state issues.